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4 **UNITED STATES DISTRICT COURT**  
5 **DISTRICT OF NEVADA**  
6

7 UNITED STATES OF AMERICA, )

8 Plaintiff, )

9 vs. )

10 ALBERT LEON HARRIS, )

11 Defendant. )  
\_\_\_\_\_ )

2:05-cr-00332-RCJ-GWF

**ORDER**

12 Pending before the Court is Petitioner Albert Leon Harris's Motion to Vacate Under 28  
13 U.S.C. § 2255 (ECF No. 142). The Court previously denied the motion, but the Court of  
14 Appeals vacated and remanded so that Petitioner could have an additional opportunity to argue  
15 for relief. The Court therefore solicits an additional brief from Petitioner and will decide the  
16 motion again after receiving it.

17 **I. FACTS AND PROCEDURAL HISTORY**

18 A grand jury first indicted Petitioner on August 24, 2005 for a single count of possession  
19 with intent to distribute a controlled substance. (*See* Indictment, Aug. 24, 2005, ECF No. 1).  
20 The Second Superseding Indictment ("SSI") lists three counts of that offense and a fourth count  
21 for possession of a firearm during and in relation to a drug crime. (*See* SSI, Oct. 10, 2007, ECF  
22 No. 96). During the second day of trial, Defendant pled guilty to the first and fourth counts  
23 pursuant to a plea agreement. (*See* Mins., Dec. 4, 2007, ECF No. 129). On March 3, 2008, the  
24 Court sentenced Defendant to sixty (60) months imprisonment for each count, to run  
25 consecutively, to be followed by five (5) years of supervised release for each count, to run

1 concurrently. (*See* J. 1–3, Mar. 3, 2008, ECF No. 136). Defendant did not appeal, and the  
2 present motion is his first habeas corpus petition. Defendant brings four counts: (1) ineffective  
3 assistance for failing to file a notice of appeal; (2)–(3) ineffective assistance during plea  
4 negotiations; and (4) actual innocence.

## 5 **II. LEGAL STANDARDS**

### 6 **A. Untimely and Successive Habeas Corpus Petitions**

7 A federal habeas corpus petitioner must bring his petition under 28 U.S.C. §§ 2241, 2255  
8 within one year of the latest of: (1) final judgment of conviction; (2) the removal of any  
9 impediment to bringing the petition caused by unconstitutional government action; (3) the date  
10 on which the Supreme Court first recognizes the right asserted, if the Supreme Court has made  
11 the right retroactively applicable to collateral review; or (4) the date on which the facts  
12 supporting the claim or claims presented could have been discovered through the exercise of due  
13 diligence. 28 U.S.C. § 2255(f). Successive petitions must be approved by the Court of Appeals.  
14 *See id.* at § 2255(h).

### 15 **B. Waiver of Appeal Rights**

16 A criminal defendant who pleads guilty implicitly waives the right to challenge any pre-  
17 conviction error, unless the alleged error relates directly to the voluntariness or intelligence of  
18 the guilty plea itself:

19 When a criminal defendant has solemnly admitted in open court that he is in fact  
20 guilty of the offense with which he is charged, he may not thereafter raise  
21 independent claims relating to the deprivation of constitutional rights that occurred  
prior to the entry of the guilty plea. He may only attack the voluntary and intelligent  
character of the guilty plea . . . .

22 *Tollett v. Henderson*, 411 U.S. 258, 267 (1973). Furthermore, a defendant may explicitly waive  
23 the right to appeal the sentence via plea agreement, so long as the waiver is voluntary and  
24 intelligent. *United States v. Cope*, 527 F.3d 944, 949 (9th Cir. 2008).

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1 341 F.3d 921, 925–27 (9th Cir. 2003) (citing *Strickland*, 466 U.S. 668). Ineffective assistance of  
2 counsel claims may be brought for the first time in a § 2255 petition, even if they could also have  
3 been brought on direct appeal. *Massaro v. United States*, 538 U.S. 500, 504 (2003).

4 There is a “strong presumption” of reasonable professional conduct. *Strickland*, 466 U.S.  
5 at 698. When this presumption is overcome and an attorney’s “unprofessional errors” are such  
6 that there is a “reasonable probability” the result would have been different had the errors not  
7 occurred, the defendant has been deprived of his Sixth Amendment rights. *Kimmelman v.*  
8 *Morrison*, 477 U.S. 365, 375 (1986). “Reasonable probability” is a lower standard than “more  
9 likely than not.” *Nix v. Whiteside*, 475 U.S. 157, 175 (1986). Counsel’s tactical decisions with  
10 which a defendant disagrees do not rise to the level of ineffective assistance unless the decisions  
11 are so poor as to meet the general test for constitutionally defective assistance. *See Dist.*  
12 *Attorney’s Office for Third Judicial Dist. v. Osborne*, 129 S. Ct. 2308, 2330 (2009).

## 13 **2. Actual Innocence**

14 “To establish actual innocence for the purposes of habeas relief, a petitioner ‘must  
15 demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror  
16 would have convicted him.’” *Alaimalo v. United States*, 645 F.3d 1042, 1047 (9th Cir. 2011)  
17 (quoting *Stephens v. Herrera*, 464 F.3d 895, 898 (9th Cir. 2006) (quoting *Bousley*, 523 U.S. at  
18 623)). “A petitioner is actually innocent when he was convicted for conduct not prohibited by  
19 law.” *Alaimalo*, 645 F.3d at 1047 (citing *Reyes-Requena v. United States*, 243 F.3d 893, 904 (5th  
20 Cir. 2001)).

## 21 **D. § 2255 Habeas Corpus Motions**

22 A judge receiving a motion to vacate, set aside, or correct a sentence pursuant to 28  
23 U.S.C. § 2255 “must promptly examine it.” Section 2255 R. 4(b). “If it plainly appears from the  
24 motion, any attached exhibits, and the record of the prior proceedings that the moving party is

1 not entitled to relief, the judge *must* dismiss the motion . . . .” *Id.* (emphasis added); *United*  
2 *States v. Matthews*, 833 F.2d 161, 164 (9th Cir. 1987) (citing *id.*). If not dismissed, the judge  
3 must order the U.S. Attorney to respond within a fixed time. *Id.*

### 4 **III. ANALYSIS**

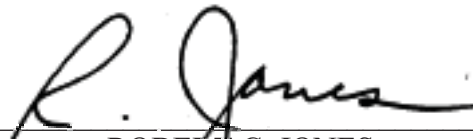
5 The Court denied the Petition as untimely. First, Petitioner filed the Petition more than  
6 one year after the judgment of conviction became final. Second and third, Petitioner alleged no  
7 unconstitutional government action impeding his Petition<sup>1</sup> or any newly recognized right. And  
8 fourth, Petitioner’s claims were all based upon information admittedly available to him more  
9 than one year before he filed the Petition.

### 10 **CONCLUSION**

11 IT IS HEREBY ORDERED that Petitioner shall file a brief within twenty-eight (28) days  
12 from date of the entry of this order into the electronic docket showing why his motion for relief  
13 under § 2255 should not be dismissed for untimeliness. The Government shall have fourteen  
14 (14) days to respond, and Petitioner shall have fourteen (14) days to reply.

15 IT IS SO ORDERED.

16 Dated this 28th day of June, 2012.

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20 ROBERT C. JONES  
United States District Judge

21 <sup>1</sup>Petitioner appears to allege that his attorney’s failure to file a notice of appeal  
22 unconstitutionally impeded his ability to bring his other claims *on direct appeal*. But Petitioner  
23 waived his right to appeal pre-conviction error when he pled guilty, *see Tollett*, 411 U.S. at 267,  
24 so counsel simply did not err by failing to file a notice of appeal. And even if the Court were  
absolutely convinced that the guilty plea was made unintelligently—based on Petitioner’s claim  
today that he did not in fact employ a firearm during the offense under the meaning of the  
statute—Petitioner does not allege that his attorney’s errors (or any other government action)  
impeded him from bringing his Petition within one year of final judgment.